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No. 84-1142

In the Supreme Court of the United States

OCTOBER TERM, 1984

EXXON CORPORATION, PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the doctrine of laches barred petitioner's challenge to the validity of the ethane exclusion rule, 10 C.F.R. 212.168(a) (1980), presented for the first time more than six years after promulgation of the rule and four months after petroleum price controls had expired.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 752 F.2d 650. The opinions of the district court (Pet. App. 40a-67a, 68a-87a) are reported at 582 F. Supp. 911 and 927.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1984. The petition for a writ of certiorari was filed on January 16, 1985. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.

STATEMENT

1. The Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 *et seq.*, authorized a program of mandatory allocation and price controls for petroleum products. Pursuant to that authority, the Federal Energy Administration (FEA) in 1973 promulgated the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Pt. 212 (1980). Subpart E of those regulations froze the prices of all refined petroleum products at their May 15, 1973, levels, but permitted refiners to pass through to customers any actual increases in the cost of the crude oil and natural gas used for refining. Under Subpart E, once a refiner determined its increased product cost for a month, it was permitted to allocate that cost among the various finished petroleum products, pursuant to the refiner cost allocation formula, 10 C.F.R. 212.83 (1980).

In May 1974, FEA amended a Subpart E provision, known as the V-factor regulation, to require that refiners of crude oil and natural gas allocate on the basis of volume a portion of their overall increased costs to six products (including ethane) that were exempt from controls. As a result of such allocation, any increased cost attributed to these exempt products was not available for passthrough to consumers in the form of increases in prices of controlled petroleum products. This prevented refiners from avoiding price controls by recovering cost increases twice, once in the prices of the exempt products and again in the prices of the controlled products.[1]

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[1]In 1976, Mobil Oil Corporation challenged the May 1974 amendment to the V-factor regulation on the ground that FEA had erred in using emergency rulemaking procedures, rather than notice and comment procedures. The Temporary Emergency Court of Appeals upheld Mobil's challenge and invalidated the amendment for the period prior to its repromulgation in February 1976. *Mobil Oil Corp.* v. *DOE*, 610 F.2d 796 (1979), cert. denied, 446 U.S. 937 (1980). See also *Mobil Oil*

In September 1974, FEA proposed amendments to the Mandatory Petroleum Allocation and Price Regulations, including a new Subpart K, 39 Fed. Reg. 32718, 32730. Subpart E originally applied to both crude oil refiners and independent natural gas processors; however, it soon had become apparent that the framework of price regulation for oil refiners was not well suited to the independent natural gas processors. The new Subpart K was to be specifically applicable to gas processors, while crude oil refiners would continue to be governed by Subpart E. Pet. App. 33a. Subpart K specified, inter alia, a method (referred to as "natural gas shrinkage") by which processors of natural gas were to calculate certain increased costs of extracting natural gas liquids from natural gas.[2] Subpart K also included provisions governing determination of the portion of increased costs that could be passed through to consumers in the form of increased sales prices. In this connection, Subpart K provided for application of the V-factor methodology of Subpart E to ethane, the only natural gas product that was exempt from controls.[3] This "ethane exclusion rule," subsequently codified at 10 C.F.R. 212.168(a) (1980), is the subject of the present petition.

Corp. v. *DOE*, 678 F.2d 1083 (Temp. Emer. Ct. App. 1982). The V-factor regulation subsequently was upheld as to the period following its 1976 repromulgation. *Naph-Sol Refining Co.* v. *Murphy Oil Corp.*, 550 F. Supp. 297, 306-314 (W.D. Mich. 1982), rev'd in part on other grounds, 728 F.2d 1477 (Temp. Emer. Ct. App. 1983), cert. denied, No. 83-1515 (June 18, 1984).

[2]The four basic natural gas liquids that are extracted from natural gas are propane, butane, natural gasoline, and ethane. Pet. App. 1a n.1. The term "shrinkage" refers to the fact that when a producer extracts natural gas liquids from a stream of natural gas, the volumetric and thermal content of the stream are reduced. *Id.* at 2a.

[3]The V-factor formula expressed the volume of ethane sold as a percentage of the volume of all natural gas liquid products sold. The rule required reduction by that percentage of the "increased product costs" attributable to the volume of natural gas for a particular month.

Soon after Subpart K was promulgated in final form, most refiners filed comments and objections. Petitioner and Texaco, Inc. asserted no objection to the ethane exclusion rule. Mobil Oil Corporation made no reference to any alleged procedural or substantive defect in the rule; it requested only that FEA, as a matter of policy, change the ethane exclusion formula to allocate costs on the basis of thermal value (BTUs) rather than volume. Pet. App. 36a; R. 3908.

2. In the summer of 1975 petitioner filed this action in the United States District Court for the Northern District of Texas, challenging the shrinkage provisions of Subpart K as arbitrary and capricious. In its complaint petitioner made no reference to the ethane exclusion rule; it merely asked the district court to "[d]eclare that the method of valuation of natural gas liquids [*i.e.*, shrinkage] for pass-through purposes in 10 C.F.R. Part 212, Subpart K, is arbitrary and capricious, and is otherwise unlawful under the criteria set forth in 5 U.S.C. § 706(2)." R. 8. Other companies subsequently filed complaints challenging the shrinkage provisions, which were consolidated with this litigation, but none made any reference to the ethane exclusion rule.[4] Nor was there any reference to the rule in the massive discovery requests filed by the plaintiffs between 1976 and 1981.

The purpose of the rule was to prevent processors from shifting the full burden of product cost increases onto consumers of natural gas liquids other than ethane while simultaneously raising the (uncontrolled) price of ethane.

[4]Dorchester Gas Producing Company and Phillips Petroleum Corporation originally joined Exxon in challenging the shrinkage provisions. In 1978 and 1979, Pennzoil Corporation, Mobil Oil Corporation, and Texaco, Inc. intervened in the litigation. Cities Service Company and Amoco Production Company filed similar suits in the same district court in 1979. All of the plaintiffs in these proceedings, except for Exxon and Texaco, eventually were dismissed pursuant to stipulated settlements.

In 1981, four months after President Reagan terminated mandatory petroleum price controls (46 Fed. Reg. 9909), Mobil moved to amend its complaint to allege, for the first time, that the ethane exclusion rule was invalid (R. 1221). The district court granted Mobil's motion to amend on an ex parte basis on the day it was filed (R. 1220). The other plaintiffs, including petitioner, subsequently filed a joint amended complaint that incorporated Mobil's challenge to the ethane exclusion rule.[5] The Department of Energy (DOE), the successor to FEA, defended on the ground, inter alia, that the challenges to the ethane exclusion rule were barred by the doctrine of laches.[6]

The case eventually was submitted to the district court on cross motions for summary judgment on an uncontroverted factual record. The district court rejected most of the challenges to DOE's regulations and rulings, including those relating to computation of shrinkage cost, transfer prices, and use of a volume-processed formula in calculating shrinkage costs. Pet. App. 40a-67a, 68a-87a. However, the court concluded that it was required to hold the ethane exclusion rule invalid. The district court characterized the rule as a technical "transfer" of the V-factor to Subpart K and concluded that an earlier decision of the Temporary Emergency Court of Appeals invalidating the May 1974 amendment to the V-factor in Subpart E (see note 1,

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[5]Petitioner and its co-plaintiffs claimed that the ethane exclusion rule arbitrarily and capriciously allocated an excessive portion of costs to ethane and that the allocation formula should have been based on BTUs rather than volume. They also contended that DOE failed to give notice that it planned to include the ethane exclusion rule in Subpart K. Pet. App. 61a.

[6]DOE also denied the allegations that a volumetric allocation rule did not appear in the proposed Subpart K, that FEA provided no prior notice and opportunity to comment, and that FEA did not consider relevant factors. Pet. App. 31a n.24.

supra) required invalidation of the ethane exclusion rule in Subpart K. Pet. App. 60a-63a. The district court held that the doctrine of laches was not available to DOE, since the rule had already been declared invalid (*id.* at 63a); thus, the court did not consider the evidence relating to DOE's laches defense.

3. The court of appeals affirmed the rulings in favor of DOE and reversed the district court's invalidation of the ethane exclusion rule (Pet. App. 1a-39a). TECA held that its prior decision invalidating the amendment to the V-factor in Subpart E had no res judicata or collateral estoppel effect on this case. TECA rejected the contention that refiners had had inadequate notice and opportunity to comment on the ethane exclusion rule in Subpart K, since the record indicated that refiners "were reasonably on notice during the Subpart K rulemaking that a V-factor was being considered for ethane." Pet. App. 35a. On the basis of the uncontroverted factual record, TECA held that plaintiffs' six-year delay in challenging the ethane exclusion rule was unreasonable and that the delay had prejudiced the government. TECA therefore concluded that petitioner and its co-plaintiffs were barred from questioning the substantive or procedural validity of the ethane exclusion rule during the period it was in effect as a part of Subpart K. Pet. App. 38a-39a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The issues petitioner presents are unlikely to recur, since TECA has decided only the fact-bound question whether the doctrine of laches bars petitioner's challenge to the validity of a rule promulgated more than ten years ago in the formative period of an emergency oil price control program that was terminated more than four years ago. Moreover, as this Court has noted, Congress established

TECA in order to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully considered petitioner's arguments, and it rejected them in a thoughtful unanimous decision, on the basis of its analysis of the uncontroverted factual record. In these circumstances, further review is clearly unwarranted.

Petitioner does not take issue with TECA's rejection (Pet. App. 30a-31a) of the district court's determination that the defense of laches was not available to DOE because TECA previously had invalidated the May 1974 amendment to the V-factor regulation of Subpart E. Instead, petitioner contends that TECA erred in concluding that the laches defense could be decided on the record before TECA and that the two elements of the defense — unreasonable delay and prejudice to the government — had been established. That contention lacks merit.

In concluding that petitioner and its co-plaintiffs had delayed for more than six years before challenging the ethane exclusion rule, and that that delay was unreasonable, the court of appeals relied on the undisputed record of events following promulgation of the ethane exclusion rule.[7] That record clearly demonstrated that petitioner and

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[7]See Pet. App. 38a (noting that "the record of controlling circumstances is clear and indisputable"). The record considered by TECA included: (1) the Subpart K rulemaking of 1974 (R. 5606); (2) the comments submitted by the plaintiffs to FEA following the rulemaking (R. 3908); (3) the original complaint filed by petitioner (R. 1); (4) the absence of any discussion or discovery concerning the ethane exclusion rule during the course of the litigation from 1976 to 1981; (5) the original complaint in intervention of Mobil Oil Corporation in 1979 (R. 739); (6) the President's order decontrolling all petroleum products (46 Fed. Reg. 9909 (1981)); (7) the amended complaint of Mobil in May 1981, which challenged the ethane exclusion rule for the first time (R. 1221); (8) the joint amended complaint of petitioner and the other refiners,

its co-plaintiffs had opportunities to challenge the ethane exclusion rule during the six years following its promulgation, but failed to do so. In particular, in comments submitted to FEA following promulgation of the new Subpart K and in their original complaints in this litigation, petitioner and its co-plaintiffs attacked numerous aspects of Subpart K, but were silent with respect to the ethane exclusion rule.[8] Petitioner suggests no plausible justification for the refiners' "acquiescence in the operation of [the ethane exclusion] rule and their failure to take any action to question it until July 1981" (Pet. App. 35a).[9] There can be no doubt that the

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which incorporated the ethane exclusion issue (R. 1243); and (9) DOE's answer to the joint amended complaint asserting the laches defense (R. 1266).

[8]Petitioner asserts (Pet. 4) that the notice of proposed rulemaking for Subpart K made no reference to the V-factor or to volumetric allocation of costs to products (like ethane) that were exempt from price controls. In fact, as the court of appeals determined (Pet. App. 32a-35a), proposed Subpart K included several such references. Most obviously, it incorporated by reference the "cost pass through provisions for increased costs of Subpart E," *i.e.*, the V-factor regulation that provided for allocation of cost increases to exempt products on a volumetric basis. 39 Fed. Reg. 32730 (1974). (DOE ultimately decided to avoid references to Subpart E and instead to spell out provisions like the ethane exclusion rule in Subpart K itself. Pet. App. 33a.) In addition, FEA requested comments on extension of a Special Propane Rule to butane and natural gasoline. 39 Fed. Reg. 32720 (1974). If that proposal had been adopted, it would have operated (on a volumetric basis) to preclude allocation of costs associated with ethane to the other three natural gas products. Both of these proposals thus had the same effect as the ethane exclusion rule that ultimately was adopted.

[9]Contrary to petitioner's contention (Pet. 13), there was clearly an opportunity for the refiners to present evidence on this point. DOE's cross-motion for summary judgment raised and discussed the uncontroverted evidence of the refiners' lack of diligence. Fed. R. Civ. P. 56(e) required the refiners to respond by presenting any evidence in their possession that may have created a legitimate issue of fact for trial. Since petitioner and its co-plaintiffs presented no such evidence, it was

companies involved in this case are sophisticated litigants represented by experienced counsel who have not hesitated to raise every conceivable objection to DOE rules. In these circumstances, TECA surely had adequate grounds for concluding that petitioner and its co-plaintiffs delayed unreasonably when they waited to challenge the ethane exclusion rule until six years after its promulgation and four months after petroleum price controls ended.

Petitioner challenges TECA's determination that petitioner failed to address the ethane exclusion rule in its original complaint filed in 1975. Pet. 14-15. It contends that its challenge to "the method of valuation of natural gas liquids for passthrough purposes" (R. 8) somehow encompassed an attack on the ethane exclusion rule. This contention, raised for the first time during petitioner's oral argument in the district court (R. 5037),[10] is without merit.

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entirely appropriate for TECA to consider the unreasonable delay issue on the record before it.

Petitioner's citation to *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956), is inapposite. In *Czaplicki*, unlike in this case, there was no opportunity for the plaintiff to introduce evidence to justify the delay because his suit had been dismissed after preliminary hearings and argument on the issue of standing. *Id.* at 533-534.

Petitioner suggests (Pet. 14 n.12) that the refiners were justified in waiting to challenge the ethane exclusion rule until after TECA invalidated the amendment to the V-factor regulation of Subpart E in 1979 (see note 1, *supra*). But there is no reason why the refiners could not have raised at least a general challenge to the ethane exclusion rule as soon as it was promulgated. Indeed, the fact that the refiners challenged the amendment to the V-factor regulation soon after its promulgation suggests that it would have been logical for them to have filed a similar challenge to the ethane exclusion rule. A more likely explanation for the refiners' belated decision to challenge the ethane exclusion rule is that they were seeking ways to offset their potential financial liability in an enforcement action alleging that they had violated other portions of the Subpart K regulations. See Pet. 5; Pet. App. 3a n.2.

[10]Petitioner did not advance this argument in the brief it filed in the district court. See R. 2682.

Examination of the complaint reveals that the "method of valuation" referred to was synonymous with the natural gas shrinkage formula and had nothing to do with allocation of increased product costs among natural gas liquid products. TECA, which had petitioner's original complaint before it, was clearly justified in concluding that petitioner "specifically limited its objections to the shrinkage provision and directly related aspects and made no reference either in form or substance to the ethane exclusion rule" (Pet. App. 36a).

Petitioner also contends (Pet. 15-17) that its 1981 amended complaint should relate back to 1975, the date of its original complaint, pursuant to Fed. R. Civ. P. 15(c). But since petitioner's original complaint did not include any challenge to the ethane exclusion rule, there was nothing to which the amended complaint could relate back. See *Baldwin County Welcome Center* v. *Brown*, No. 83-181 (Apr. 16, 1984) (per curiam), slip op. 3 n.3 (because initial pleading did not contain fair notice of plaintiff's claim and the grounds on which it rested, "it was not an original pleading that could be rehabilitated by invoking Rule 15(c)"); 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1497 (1971); see also *National Distillers & Chemical Corp.* v. *Brad's Machine Products, Inc.*, 666 F.2d 492, 496-497 (11th Cir. 1982). Petitioner's belated amendment to its complaint cannot cure its unreasonable delay in challenging the ethane exclusion rule.

Moreover, there is ample support for the court of appeals' conclusion that the government was prejudiced by petitioner's six-year delay in challenging the ethane exclusion rule.[11] During that period there were millions of

[11]Petitioner presented no evidence that the government had not been prejudiced by the six-year delay, and it did not make such an argument in its district court brief. See R. 2682. The fact that petitioner delayed for six years in itself creates a rebuttable presumption of prejudice. See *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 926 (9th Cir. 1975).

controlled transactions that were based on the assumption that the ethane exclusion rule was valid. See Pet. App. 38a ("It is reasonable to infer from the record that most if not all other refiners routinely complied with the rule as promulgated and that possibly billions of dollars were allocated by them to exempt ethane."). DOE conducted hundreds of audits of refiners and gas processors on the same assumption. As the court of appeals concluded, the government suffered prejudice because petitioner did not challenge the rule until 1981, "following the expiration of DOE's authority to either issue or amend any regulations for the correction of defects to the extent they may have existed" (Pet. App. 36a; see also *id.* at 38a). Had petitioner alerted FEA to the alleged defects in the ethane exclusion rule in 1975, the agency could have taken corrective action, as it did in repromulgating the May 1974 amendment to the V-factor regulation of Subpart E in 1976.[12]

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[12]Petitioner errs in claiming (Pet. 14 n.12) that FEA failed to take corrective action when the V-factor regulation was being challenged. When the agency amended the V-factor regulation in 1976, it prospectively corrected the alleged procedural defect resulting from the absence of adequate notice and comment. See note 1, *supra*.

Contrary to petitioner's contention (Pet. 12), TECA's decision to address the issue of prejudice, rather than remanding to the district court, is not inconsistent with *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 215-216 (1963). In *Gutierrez*, this Court concluded that the trial court's ruling on the issue of laches was not plainly erroneous and should not have been reversed. The trial court, after hearing all the witnesses, had concluded that a longshoreman's delay in filing a libel did not prejudice the shipowner because the latter had access to records that contained the relevant facts and all potential witnesses were available and produced at trial. *Id.* at 208. Here, in contrast, the district court did not make any finding concerning prejudice; rather, it declined to reach the issue of laches at all. Pet. App. 63a. Moreover, in this case the facts relating to prejudice were undisputed. In these circumstances, TECA did not abuse its discretion in itself deciding the issue of prejudice, rather than electing to remand to the district court for that determination. Compare, *e.g.*, *City of Revere* v. *Massachusetts General Hospital*, No. 82-63 (June 27, 1983), slip op. 5 n.6.

Petitioner contends finally (Pet. 17-18) that the court of appeals should have ruled on the merits of its challenge to the ethane exclusion rule for reasons of efficiency, since it allegedly is in any event open to petitioner to raise that challenge as a defense in a related enforcement proceeding. But see, *e.g.*, *Montana* v. *United States*, 440 U.S. 147, 153 (1979). The possibility that petitioner might have a further opportunity to litigate this issue is surely not a consideration in favor of review by this Court at this time. In fact, since DOE has not charged petitioner with violating the ethane exclusion rule (see Pet. App. 37a n.30), a defense based on the alleged invalidity of that rule would not be available to petitioner in the pending enforcement proceeding.[13]

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[13]Petitioner prefaces its argument (Pet. 9-11) with an unwarranted attack on the integrity and impartiality of the 28 judges designated by the Chief Justice to serve on TECA. In support of its claim petitioner asserts (*id.* at 10-11 n.10) that from 1980 through 1984 TECA decided 91.9% of its cases on the merits (68 of 74) in favor of DOE. Petitioner's claim is both insubstantial and disrespectful of the judges who devote their time and energy to serving on TECA, and we do not believe it warrants a substantive response. Nothing in the petition indicates that the cases surveyed by petitioner were incorrectly decided. Indeed, the statistics cited by petitioner reflect what the petition itself illustrates —that many arguments raised in opposition to DOE positions in TECA cases are insubstantial. We note that our own informal survey indicates that during the same period the other courts of appeals decided 92.3% of appeals relating to the Emergency Petroleum Allocation Act on the merits (12 of 13) in favor of the government.

Petitioner also makes the baseless charge (Pet. 10-11 n.10) that "DOE, unlike other federal agencies, regularly follows the practice of taking an appeal whenever it loses." DOE does not have authority to decide on its own whether to appeal adverse decisions. Like other government appeals, appeals by DOE must be authorized by the Solicitor General, who considers the government's chances of success on the merits, as well as various prudential concerns, in deciding whether to authorize an appeal. See 28 C.F.R. 0.20(b); *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 6-7 & n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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